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PROTECT OUR COAST NJ, A NJ	:	
NONPROFIT CORPORATION;	:	SUPERIOR COURT OF NEW JERSEY
DEFEND BRIGANTINE BEACH	:	MERCER COUNTY
INC.; BARBARA McCALL; FRANK	:	LAW DIVISION
COYNE; and BILL WESTERMAN,	:	
	:	DOCKET NO.:
Plaintiffs,	:	
	:	
v.	:	COMPLAINT
	:	
STATE OF NEW JERSEY;	:	
OCEAN WIND LLC; and	:	
ORSTED NORTH AMERICA, INC.,	:	
	:	
Defendants.	:	

Plaintiffs, by their attorney, Bruce I. Afran, as and for their Complaint against

Defendants, assert as follows:

INTRODUCTION

1. On or about June 28, 2023 the Legislature approved, and on July 6, 2023 the Governor signed into law, A5651, also known as S4019, codified as P.L. 2023, C. 99, §34:1B-337 (hereafter “P.L. 2023, C. 99”), annexed as **Exhibit A** hereto.

2. This Complaint seeks declaratory and injunctive relief vacating P.L. 2023, C. 99 as unconstitutional special legislation in violation of Art. IV, Sec. VII, para. 7 of the New Jersey (1947) Constitution.

3. P.L. 2023, C. 99 authorizes subsidies to a single offshore wind developer, **OCEAN WIND LLC** and **ORSTED NORTH AMERICA, INC.** (hereafter collectively referred to as “**ORSTED**”), and to no other utility or business enterprise.

4. P.L. 2023, C. 99 is intended solely to benefit Orsted and was enacted for the singular purpose of protecting Orsted from the business and financial risks it voluntarily assumed under its approved agreement with NJ Board of Public Utilities (NJBPU) for the Ocean Wind 1 project.

5. P.L. 2023, C. 99 also eliminates by special legislative action the benefits that were supposed to have attached to ratepayers in the form of mandatory refunding by Orsted of all tax and other credits to ratepayers, the condition upon which NJBPU awarded the Ocean Wind 1 contract to Orsted and of which plaintiff ratepayers are the intended beneficiaries.

VENUE, JURISDICTION AND PARTIES

6. Venue is properly in Mercer County in that the Legislature and the Governor enacted P.L. 2023, C. 99 into law in the City of Trenton in Mercer County.

7. Jurisdiction is properly in the Law Division in that this is a dispute arising from an issue of law, namely the illegal and unconstitutional nature of P.L. 2023, C. 99.

8. Plaintiffs **PROTECT OUR COAST NJ** and **DEFEND BRIGANTINE BEACH** are not-for-profit corporations organized under the laws of the State of New Jersey to promote the health of the coastal region in New Jersey, to work to minimize or eliminate the impact of ocean-based wind turbine facilities and to minimize the cost and burden to New Jersey residents, including ratepayers, of such industrial, offshore facilities.

9. Plaintiff **BARBARA McCALL** is the owner of property situated at 404 21st Street, Ocean City, NJ 08226 and, in connection with such property, is an electricity subscriber who is a ratepayer in New Jersey.

10. Plaintiff **FRANK COYNE** is the owner of property situated at 223 Asbury Avenue, Ocean City, NJ 08226 and, in connection with such property, is an electricity subscriber who is a ratepayer in New Jersey.

11. Plaintiff **BILL WESTERMAN** is the owner of George's Candies situated at 700 Boardwalk, Ocean City, NJ and George's Ice Cream situated at 706 Boardwalk, Ocean City, NJ and, in connection with such businesses and/or properties, is an electricity subscriber who is a ratepayer in New Jersey.

12. The individual plaintiffs are residents and/or property or business owners who subscribe to electric service from public utilities in this State and are intended beneficiaries of the June 21, 2019 agreement between Orsted and BPU that required Orsted to pass on all credits and grants to ratepayers so as to limit the financial exposure of ratepayers from the cost of construction, development and implementation of Ocean Wind 1; such benefits and protection are eliminated by the adoption and enactment of P.L. 2023, C. 99.

13. Defendant **STATE OF NEW JERSEY** enacted P.L. 2023, C. 99 by legislative and gubernatorial approval.

14. Defendants **OCEAN WIND LLC** and **ORSTED NORTH AMERICA, INC.** ("**ORSTED**") are the owner and/or developer of Ocean Wind 1, a 98-unit ocean-based wind turbine facility proposed to be constructed off the New Jersey coast at or near to Atlantic City, Brigantine and Ocean City, pursuant to a June 21, 2019 agreement approved and accepted by

the New Jersey Board of Public Utilities. See NJBPU Order, *In the Matter of the Board of Public Utilities Offshore Wind Solicitation for 1,100 MW — Evaluation of the Offshore Wind Applications*, DOCKET NO. Q018121289 and Attachment B to Order; annexed as **Exhibit B** to this Complaint (“NJBPU Order”).

FACTUAL BACKGROUND

15. P.L. 2023, C. 99 provides special subsidies or financial credits to Orsted in connection with the construction and development of Ocean Wind 1, an offshore wind turbine facility approved by NJBPU on June 21, 2019.

16. To obtain such approval, Orsted represented to NJBPU that it would return revenue, including credits, to ratepayers so as to limit the financial impact of Ocean Wind 1 on the ratepayer; it was, in substantial part, on the basis of such representations that NJBPU awarded Ocean Wind 1 to Orsted.

17. P.L. 2023, C. 99 shields and protects Orsted from such prior commitments to NJBPU, namely that Orsted agreed it would minimize the impact of Ocean Wind 1 to ratepayers by turning over tax credits and other benefits, present or future, to ratepayers for the purpose of reducing the financial impact of the project on ratepayers.

18. These representations are set forth in Orsted’s Application to the NJBPU, see **Exhibit D** hereto, and in the NJBPU’s award to Orsted, **Exhibit B** hereto.

19. Orsted made numerous representations in its application for Ocean Wind 1 that it would absorb the cost of the wind turbine project, that it would return credits to ratepayers and that ratepayers would not bear the financial cost of the turbine project.

20. Orsted represented repeatedly that it would protect ratepayers from the financial costs of Ocean Wind 1, namely that Orsted’s interests “are well-aligned with those of the ratepayers Orsted serves”, that Ocean Wind 1 is intended to benefit ratepayers by “[p]roviding ... *transmission rate relief for ratepayers*”, that Ocean Wind 1 will be “[a]chieving all of this at the *lowest reasonable cost and risk to New Jersey ratepayers*”, and that “Ocean Wind’s highest priority *is delivering the best value to New Jersey ratepayers*”, among other representations. See **Exhibit D** at ES.2, ES 2.4 [emphasis added].

21. Orsted expressly represented to NJBPU that it has sufficient capital to deliver the lowest rates possible to ratepayers and that its proposal “will create access to *the lowest cost sources of capital, ultimately reducing the cost of the clean energy delivered from the Project to New Jersey ratepayers.*” See **Exhibit D** at Section 3. “Project Financial Analysis” at 3.3 [emphasis added].

22. Orsted induced NJBPU to grant it the Ocean Wind 1 rights based on the express representation that it would NOT keep federal tax credits but would pass them on to the ratepayers, as Orsted stated:

Concerning tax credits, *the Project is uniquely positioned to qualify for the Federal Investment Tax Credit (ITC)* on an accelerated schedule that will maximize value, *passing resulting cost reductions to New Jersey ratepayers.*

See **Exhibit D** at Section 3. “Project Financial Analysis” at 3.6 [emphasis added].

23. Orsted represented to NJBPU that it “typically finances investments out of its *corporate balance sheet instead of at the project-level with non-recourse debt due to its financial strength*”, a representation designed to protect ratepayers from bearing the cost of

project development. See **Exhibit D** at Section 3. “Project Financial Analysis” at 3.3 [emphasis added].

24. Orsted represented that the business structure of its proposal would result in positive returns to ratepayers by the use of “tax equity” financing, that it would look to “non-recourse project financing” as “the *most effective way to reduce costs to ratepayers..*” and that its capital structure’s “*flexibility ultimately drives down the cost for the Project and in the long term will benefit New Jersey ratepayers.*” See **Exhibit D** at Section 4 “Sources of Capital” at 4-3 and 4-4 [emphasis added].

25. Orsted represented to NJBPU that pursuant to N.J.A.C. 14:8-6.5(a)(12)(iv), “*Ratepayers will not be responsible for any cost overruns...*” See **Exhibit D** at Section 12 “OREC Pricing Method and Schedule” at 12-6 [emphasis added].

26. The NJBPU Order identifies and stipulates that avoiding such “ratepayer impacts” are among the “critical elements” in the NJBPU’s analysis of the Orsted application. See NJBPU Order at Section 9, **Exhibit B** at 33; see also Appendix A to NJBPU Order analyzing “ratepayer impacts” as part of the financial analysis for Ocean Wind 1.

27. Citing N.J.A.C. 14:8-6.5(a)12(ix), the NJBPU Order states that its goal is to protect ratepayers by requiring that credits, grants and the like be refunded to the ratepayer whether they arise *before or after* the contract is awarded:

N.J.A.C. 14:8-6.5.(a).12.(ix) required that each applicant is required to refund to ratepayers revenues associated with the sale of energy, capacity, ancillary services, environmental attributes, and any other revenues, including (but not limited to) tax credits, subsidies, grants, or other funding not identified in the application and not included in the OREC price submitted, over the 20-year term of OREC. All revenues are to be credited to ratepayers except for any sales in excess of the Annual OREC cap for energy.

NJBPU Order, Section 6.2 at p. 23, citing N.J.A.C. 14:8-6.5.(a).12.(ix), **Exhibit B** hereto.

28. By allowing Orsted to keep federal tax credits for its own account, P.L. 2023, C. 99, by legislative action, relieves Orsted of these promises and commitments and does so for the purpose of increasing Orsted's earnings and/or profits on Ocean Wind 1.

29. P.L. 2023, C. 99 is intended to provide credits to Orsted beyond those approved by NJBPU. Specifically, the statute provides to Orsted credits that were "not estimated in the project's original financial analysis and not included in the calculation of the OREC price submitted to the board." See Definition, "Incremental federal tax benefit", P.L. 2023, C. 99, §34:1B-337; **Exhibit A** hereto.

30. In other words, the newly-enacted statute allows Orsted to keep federal credits not in existence at the time of the NJBPU's approval despite Orsted's agreement with NJBPU that it would pass future tax credits onto the ratepayers.

31. In enacting P.L. 2023, C. 99 the Legislature intentionally sought to benefit **only Orsted**, as shown by the statute's definition of a "Qualified offshore wind project" as "a wind turbine electricity generation facility in the Atlantic Ocean in the Bureau of Ocean Energy Management Lease Area OCS-A 0498, awarded by the board prior to July 1, 2019,..." See Definition, "Qualified offshore wind project", P.L. 2023, C. 99, §34:1B-337; **Exhibit A** hereto.

32. As the Legislative Statement accompanying the statute admits, this definition is intended to apply **only** to Orsted's Ocean Wind 1 project:

"Ocean Wind 1 is the only qualified offshore wind project to which the bill applies."

See Legislative Statement, Assembly Budget Committee at 3; **Exhibit E** hereto.

33. Thus, P.L. 2023, C. 99 is designed and intended to benefit only one entity, Orsted, as acknowledged by the Legislature. *Id.*

34. The Legislative Statement also demonstrates that the Legislature was intending to excuse and relieve Orsted, and no other utility or developer, from obligations and restrictions it voluntarily assumed when it applied for approval of the Ocean Wind 1 project from NJBUP:

The bill would allow Orsted to retain certain incremental federal tax benefits *without passing the value of those benefits to ratepayers* or adjusting the offshore wind renewable energy certificate (OREC) pricing schedule for Ocean Wind 1.

See A5651, Statement, Assembly Budget Committee at 3; **Exhibit E** hereto [emphasis added].

35. In an official communication to the Legislature, New Jersey Rate Counsel has declared that P.L. 2023, C. 99 “will increase” the amount earned by Orsted and will increase the burden to ratepayers beyond the approved terms and conditions of Orsted’s contract with NJBPU:

“There should be no doubt that this bill will increase the amount the developer earns on this project and will result in higher ... prices being paid by ratepayers.”

See Statement, June 26, 2023, Division of Rate Counsel to Senate Budget and Appropriations Committee at 2; **Exhibit C** hereto

36. For the reasons asserted in this Complaint, P.L. 2023, C. 99 is unconstitutional special legislation and should be vacated and permanently enjoined.

COUNT I

P.L. 2023, C. 99 IS SPECIAL LEGISLATION IN VIOLATION OF ART. IV, SEC. VII, PARA. 7 OF THE NEW JERSEY CONSTITUTION

37. The allegations set forth above are repeated and restated as if more fully restated below.

38. P.L. 2023, C. 99 is “special” legislation in violation of Art. IV., Sec. VII, para. 7 that has the singular purpose of benefitting Orsted by increasing its earnings or profits from Ocean Wind 1 and, further, by protecting Orsted from the effects of the contract it knowingly entered into with NJBPU on or about June 21, 2019.

39. P.L. 2023, C. 99 allows Orsted to keep federal tax credits it would otherwise have been required to pass on to ratepayers under the 2019 NJBPU-Orsted Agreement.

40. As such, P.L. 2023, C. 99 is specially designed to allow Orsted to increase its earnings or profits from Ocean Wind 1.

41. P.L. 2023, C. 99 provides such special benefits to Orsted and does so for the singular purpose of protecting Orsted from commercial risk it voluntarily assumed when it bid for Ocean Wind 1 and accepted the BPU terms of approval.

42. No other utility and/or offshore wind turbine developer has been given special subsidies by the Legislature to augment or expand its earnings or profitability or reduce its costs.

43. No other utility and/or offshore wind turbine developer has been given the opportunity by the Legislature to avoid commitments or contractual obligations voluntarily assumed with NJBUP.

44. Other developers proposed offshore wind turbines in competition with Orsted for the Ocean Wind 1 project. These include, *inter alia*, Atlantic Shores Offshore Wind, a partnership between EDF Renewables and Shell New Energies, and Boardwalk Wind, owned by Equinor. However, other developers have not been given the opportunity by the Legislature to re-bid, renew or restructure their proposals or the terms of an agreed project, or to take advantage of the favorable subsidies newly-awarded to Orsted via P.L. 2023, C. 99.

45. No adequate factual basis is presented by the Legislature to support this special subsidy to Orsted and the special legislative release of Orsted's contractual commitments.

46. To the contrary, P.L. 2023, C. 99 predicates this special grant of subsidies to Orsted on mere generalized grounds of "inflation" and "labor shortages and supply chain issues" from Covid and the Ukraine war, business risks that impact Orsted in the same manner as any other any other company in any business or industry; the Legislature does not identify or describe such risks as being uniquely particularized or peculiar to Orsted (or to Ocean Wind 1) so as to support or justify special legislation in favor of Orsted.

47. No substantive or adequate rationale or reason has been advanced by the Legislature to support or sustain the classification of Orsted into a unique and separate class, consisting of itself, that is entitled to special subsidies or special post-contractual benefits to increase its profits or earnings.

48. As New Jersey's Rate Counsel declared to the Legislature just four weeks ago, no factual basis beyond speculation has been offered to establish that any actual financial need exists to allow Orsted to retain additional tax credits. As Rate Counsel said,

*"there has been no review of any project numbers to indicate actual need. **Rather, there are just unproven, bald assertions in the press by one project developer.**"*

See Statement, June 26, 2023, Division of Rate Counsel to Senate Budget and Appropriations Committee at 2; **Exhibit C** hereto [emphasis added].

WHEREFORE, declaratory relief is sought that P.L. 2023, C. 99 is unconstitutional as special legislation in violation of Art. IV, Sec. VII, Para. 7 of the New Jersey Constitution and should be preliminarily and permanently enjoined along with any distribution of tax credits to Orsted, along with attorney's fees, cost of suit and such other relief as to the Court may seem just and proper.

CERTIFICATION PURSUANT TO R. 4:5-1

Bruce I. Afran hereby certifies:

1. I am an Attorney at Law of the State of New Jersey, and attorney for the plaintiff in the above-captioned matter.

2. To the best of my knowledge, information and belief there is no other action(s) pending regarding the subject matter of this Complaint in a Court or arbitration proceeding except for the following:

an appeal filed by plaintiffs against New Jersey Department of Environmental Protection in the Appellate Division under Docket No. A-003047-22 and captioned *IN THE MATTER OF THE CHALLENGE TO THE CONSISTENCY CERTIFICATION OF THE OCEAN WIND 1 OFFSHORE WIND TURBINE PROJECT, NJDEP FILE NO. 0000-21-0008.1, CDT210001.*

The above-referenced appeal, A-3047-22 (the “Consistency” appeal), challenges a decision by NJDEP that the federal offshore wind program is consistent with New Jersey’s Coastal Zone Management Act; the present case does not concern the environmental issues raised in the Consistency appeal but, rather, concerns the constitutionality of a statute, P.L. 2023, C. 99, granting subsidies to Defendant Orsted, issues that are neither raised on the Consistency appeal nor are relevant to that appeal.

CERTIFICATION PURSUANT TO R. 1:38-7(b)

I certify that confidential personal identifiers have been redacted from documents now submitted to the court, and will be redacted from all documents submitted in the future in accordance with Rule 1:38-7(b).

DESIGNATION OF TRIAL COUNSEL

PLEASE TAKE NOTICE that, pursuant to R. 4:18-4, BRUCE I AFRAN, Esq. is hereby designated as trial counsel in the above captioned matter.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Bruce I. Afran', written over a horizontal line.

Bruce I. Afran,
Counsel for Plaintiffs

Dated: July 27, 2023